Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers	))	WT Docket No. 05-265

REPLY COMMENTS OF VERIZON WIRELESS

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SUMMARY

The FCC's longstanding reliance on a competitive CMRS market to drive benefits to consumers, rather than on intrusive economic regulation, has promoted rapid growth and technology development in the CMRS marketplace. The record in this proceeding provides no basis to depart from that settled deregulatory policy. The Commission has over many years considered whether to impose automatic roaming rules, but has consistently declined to do so, and it should not change that policy now. For over those same years, while automatic roaming remained unregulated, the CMRS market has, by the Commission's own findings, become even more competitive, prices for roaming as well as retail services have fallen, and consumers and the American economy have benefited.

The Commission's reliance on competition has also benefited rural America. Verizon Wireless alone invests billions of dollars each year in its network and relies heavily on the superior network quality to attract new customers and keep existing customers. It and other carriers have expanded their networks into rural areas in part to avoid paying high roaming charges that some rural providers have charged. Rural providers, in turn, know that national and regional providers place a high value on having roaming partners that have good coverage and that allow subscribers to use their advanced digital services when they roam. The FCC's hands-off roaming policy has thus provided incentives to rural carriers to expand their networks and to implement advanced services.

The Commission's proper reliance on the market rather than on economic regulation of roaming has in short contributed to expanded services, deployment of advanced technology, and lower prices. A decision in this proceeding to regulate automatic roaming would be contrary to the public interest and a huge, unjustified step backwards. Imposing the rules that proponents of

regulation seek would force carriers to treat dissimilarly situated carriers the same, contravening long-standing Section 202(a) principles and orders interpreting this provision. Regulating roaming prices would also conflict with numerous Commission decisions to reduce price regulation of competitive communications services. It would thrust the FCC back into policing the rates and terms of arms-length business agreements between competitive carriers, forcing it to bear new and unnecessary burdens, without any commensurate benefits to consumers.

Some carriers have argued that automatic roaming should be mandated and pricing regulated. Many of these carriers seek regulation in order to protect high roaming rates that have been declining due to competition. Carriers that favor regulation claim that automatic roaming services are being denied to small carriers, and that the agreements they are able to obtain are often asymmetrical and require them to pay high rates to roam on the networks of large carriers. However, carriers that favor new rules failed to provide support for their arguments. Comments in this proceeding provide almost no evidence of denial of roaming service or of asymmetrical agreements that favor large carriers. Verizon Wireless, for example, does not deny carriers automatic roaming agreements, and all of its asymmetrical agreements with smaller providers require Verizon Wireless to pay more to those carriers than it receives. Many smaller providers enjoy among Verizon Wireless' best roaming rates. Verizon Wireless demonstrates in these reply comments that the few allegations made against it omit or misrepresent key facts, and provide absolutely no basis to consider new rules.

Similarly, there is no basis for the FCC to require carriers to offer home area roaming or to mandate advanced digital services roaming. Mandating home roaming would undercut the very market incentives that have driven down prices and promoted deployment of new services. The Commission should also refrain from intervening in data roaming, given the rapid evolution of data services, technological incompatibilities among those services, the lack of any evidence that dictating the technologies that carriers must offer to roaming partners will have any benefits, and the practical problem of crafting rules as to what data services must be offered when those services are constantly changing.

The record in this proceeding does not demonstrate market failure by any measure. Under settled Commission policy, particularly as it applies to the CMRS market, proof of such failure is the prerequisite to imposing economic regulation. The Commission should affirm its competitive market policies and should not adopt any automatic roaming rules.

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Verizon Wireless hereby submits its reply comments in response to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding. In the NPRM, the Commission seeks information and comments pertaining to Commercial Mobile Radio Services ("CMRS") roaming practices.

The record in this proceeding demonstrates that the market for CMRS, including roaming arrangements, is competitive. Despite the efforts of some wireless carriers to portray large carriers as all-powerful and to make claims of market failure, the facts reveal a different story. Verizon Wireless is not denying roaming agreements to smaller carriers, nor is it discriminating against smaller carriers as to roaming rates. In fact, the company has no roaming agreements where a small carrier pays more than what it receives from Verizon Wireless. The most asymmetrical agreements Verizon Wireless has, in terms of Verizon Wireless paying more than it charges its roaming partner, are with small rural carriers, many of whom enjoy some of the lowest roaming rates available. The paucity of allegations from the proponents of new rules leaves the Commission with a record that falls well short of the clear, documented evidence of market failure that the Commission stated it would require before considering new rules. To the contrary, the facts and economic analysis submitted by Verizon Wireless and other parties demonstrates that, far from a failing CMRS market, that market remains fully competitive, and that any intervention would distort and impede that market. There is simply no basis for the FCC to consider any automatic roaming rules.

I. MANY SMALL PROVIDERS WANT A ROAMING REQUIREMENT ONLY TO PROTECT HIGH ROAMING PRICES.

In their opening comments, Verizon Wireless and others cautioned that many small carriers seek automatic roaming rules not to ensure access to reasonably priced automatic roaming from other carriers, but rather to protect revenue streams that many small and rural carriers have enjoyed from the sale of roaming services at high prices to large service providers.[1] Verizon Wireless commented that the FCC should not adopt regulations to protect carriers that have lost revenues due to declining roaming rates. Rather, the Commission should only consider taking action if there is clear evidence of market failure that is harming consumers. It is not the FCC's job to protect a carrier's ability to charge high roaming rates or to insulate them from competition.[2]

Opening comments in this proceeding provide support for Verizon Wireless' contention that certain carriers seek regulation to protect their own high roaming prices. Most notably, the Rural Telecommunications Group and the Organization for the Protection and Advancement of Small Telecommunications Companies ("RTG/OPASTCO") stated that small carrier roaming revenues have dwindled.

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1 Verizon Wireless Comments at 13-14; Cingular Comments at 19; Sprint Comments at 9-12.

2 Verizon Wireless Comments at 13-14. *See also* Sprint Comments at 9-12.

RTG/OPASTCO also acknowledged that roaming revenues are a significant part of small provider revenues, ranging from 30 to 65 percent of total revenues.[3]

Given these statements, it is not surprising that several of the examples of alleged market failure set forth by RTG/OPASTCO in their comments are situations where a large carrier had to refuse to roam on a smaller carrier network before the smaller carrier would lower its roaming rates.[4] These examples demonstrate that the goal of many carriers in this proceeding is protection of roaming revenues.

It is particularly revealing that RTG/OPASTCO favor a regulatory scheme that would apply only to large carriers, enabling small carriers to pick and choose terms and conditions from large carrier agreements. While the details of their proposal were not fully set forth, it appears that the RTG/OPASTCO regulatory scheme would force the largest carriers to make their lowest rates available to all technically compatible small carriers, while some small carriers would be unregulated and therefore able to protect their roaming revenue streams.[5] As Verizon Wireless stated in its opening comments, protecting competitor revenues is not a valid reason to regulate. Regulation should only be adopted if necessary to ensure that customers that want to roam have that ability, and the record does not provide a factual basis for the Commission to make that finding.[6]

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[3] RTG/OPASTCO Comments at 7-8.

[4] *Id.*, at 11-13. These examples do not demonstrate market failure, but rather show that the competitive roaming marketplace is working to drive costs downward.

[5] As Verizon Wireless stated in its comments, there is no evidence to support a regulation that would apply only to some carriers. Moreover, adopting any regulation that applied only to some carriers would fly in the face of the 1993 Budget Act and FCC policies aimed at establishing regulatory symmetry. Verizon Wireless Comments at 17-19.

[6] Verizon Wireless Comments at 13.

Another example of how some carriers may be using this proceeding in an effort to maximize revenues is evident in Leap's statements about its roaming charges. Leap argued in its comments that due to market advantages held by larger carriers in roaming negotiations, it has been unable to obtain automatic roaming at just and reasonable rates.[7] However, as discussed *infra*, Leap was able to negotiate an automatic roaming agreement with Verizon Wireless that gives Leap access to Verizon Wireless' nationwide digital network at a very low rate. Leap acknowledged in its comments that it charges its customers about $0.17 per minute for the first 30 minutes of roaming per month, then $0.59 per minute afterwards.[8] The roaming prices that Leap is charging its customers are significantly higher than the rate Leap is paying Verizon Wireless for each nationwide roaming minute, and the $0.59 per minute rate is several times higher than what Leap pays Verizon Wireless. It appears, then, that Leap is earning a significant profit on its roaming service. Leap can hardly claim that FCC regulation is necessary to lower roaming rates when it appears to be marking up its roaming charges from Verizon Wireless to earn a profit.

II. CONSISTENT WITH SECTION 202(A), MARKETPLACE COMPETITION PROPERLY RESULTS IN DIFFERENT ROAMING CONDITIONS FOR DIFFERENTLY SITUATED CMRS CARRIERS.

The Commission seeks comment on whether large or nationwide carriers should "be required to make their networks available to all roaming partners on the same terms

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7 Leap Comments at 13-14.

8 *Id.*, footnote 8.

and conditions as they offer to their 'most-favored' roaming partners."[9] Adopting such a requirement would be contrary to well-established precedent and would have highly undesirable results. As explained in Verizon Wireless' initial comments, there are numerous factors that materially distinguish providers in the roaming context, including customer base size, implementation of advanced technologies, geographic coverage within the market, and availability of supply.[10] Distinctions such as these warrant differences in the terms negotiated between carriers.

Indeed, special roaming rules for small carriers despite their drastically different circumstances would turn the section 202(a) nondiscrimination principle on its head. Instead of ensuring that similarly situated carriers are treated the same, the Commission would irrationally force onto the marketplace identical treatment of *dissimilarly* situated entities. But as the Supreme Court has observed, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[11] Similarly, by way of analogy, the Commission has stated in the context of section 253 that "treating differently situated entities the same can contravene the

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9 NPRM at para. 42. The Commission also asks whether it should create a new "Tier IV" category of CMRS providers consisting solely of carriers with 100,000 customers or less. *Id.* at para. 43. For the reasons set forth in Verizon Wireless initial comments, the Commission clearly should not. Such arbitrary and unwarranted distinctions among competitors in imposing economic regulation would directly violate Congress' directive in the 1993 Budget Act and prior Commission decisions implementing "regulatory symmetry" for the CMRS market. Verizon Wireless Comments at 16-19.

10 Verizon Wireless Comments at 4, 19.

11 *Jenness et al. v. Fortson*, 403 U.S. 431, 442 (1971). *See also Anderson v. Celebrezze*, 460 U.S. 780, 801 (1983); *Kuntz v. New York State Senate*, 113 F.3d 326, 328 (2d Cir. 1997); *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996); *Faulkner v. Jones*, 10 F.3d 226, 230 (4th Cir. 1993).

requirement for competitive neutrality."[12] The record here cannot justify heavy-handed Commission intrusion into the marketplace to discriminate in favor of small carriers. Rather, in the absence of clear evidence supporting regulatory intervention – evidence notably missing from this record – the Commission should retain the competitively neutral regulatory scheme currently in place and not intervene in favor of small carriers by providing them with treatment not otherwise justified by the competitive marketplace.

Ensuring competitive neutrality is particularly warranted in the CMRS market. At least since the 1993 Budget Act, Congress and the Commission have relied on competition to bring the public interest benefits of wireless to the American public, with resounding success. As the Commission has found, a CMRS carrier's success "should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs – and not by strategies in the regulatory arena."[13] A "most-favored partner" approach would severely undermine these principles, creating a government-imposed competitive advantage that would skew incentives for build-out, deployment of advanced services, and price competition. The resulting inefficiency would be detrimental to providers and consumers alike. The record here falls far short of justifying such a heavy-handed government intrusion into the successful competitive operation of the CMRS marketplace.

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12 In the Matter of The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, CC Docket No. 98-1, 14 FCC Rcd 21697 at 21725, para. 52 (1999).

13 In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1420 (1994).

Giving special benefits to small carriers here would also be inconsistent with previous Commission recognition of the public interest benefits of treating differently situated entities differently. The Commission has previously rejected arguments that carriers must treat entities alike notwithstanding fundamental and material differences. For example, the Commission rejected an argument that volume discount arrangements in the access charge context violate section 202(a), concluding that "reasonable volume and term discounts can be a useful and legitimate means of pricing special access services to recognize the efficiencies associated with larger volumes of traffic and the certainty of longer term deals."[14] The same logic governs here: Carriers must be permitted to account for differences among the benefits offered by potential roaming partners.

To the extent that small and rural carriers seek license to cherry-pick individual provisions of existing roaming agreements, such a result would also be blatantly inconsistent with Commission precedent in an analogous context. In 2004, the Commission reversed its previous determination that competitive LECs seeking to "opt in" to an existing interconnection agreement could "pick and choose" among that agreement's specific provisions.[15] It found that the "pick and choose" rule "fail[ed] to

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14 In the Matter of Expanded Interconnection With Local Telephone Company Facilities, Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket Nos. 91-141, 92-222, *Report and Order and Notice of Proposed Rulemaking*, 7 F.C.C.R. 7360, para. 200 (1992). *See also* In the Matter of AT&T Corp. et al. Joint Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire, and Operate Capacity in a Digital Submarine Cable System, *Memorandum Opinion, Order, and Authorization*, File No. ITC-98-437, 14 FCC Rcd 13436, 13439, paras. 9-10 (year) (authorizing volume-discount pricing of digital submarine cable system capacity).

15 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Second Report and Order*, 19 FCC Rcd 13494 (2004) (subsequent history omitted).

promote … meaningful, give-and-take negotiations" and prevented carriers from trading off favorable terms in one part of an agreement against less favorable terms in another.[16] "The result has been the adoption of largely standardized agreements with little creative bargaining."[17] In the roaming context, too, the adoption of a "pick and choose" rule would have insidious consequences – particularly for small carriers themselves. As noted previously, many of these carriers already enjoy Verizon Wireless's *lowest* roaming rates, and migration to a national average would therefore *increase* their roaming costs.[18]

In short, interfering with the marketplace to adopt a rule requiring identical treatment of all potential roaming partners notwithstanding their substantial differences would turn the non-discrimination principle of section 202(a) on its head by requiring that differently situated carriers be treated the same. Given the widely recognized competitiveness of the CMRS market, and all of the benefits that have inured to the public as a result – including the widespread availability of plans that include no charges for roaming – the Commission should not impose intrusive regulatory requirements absent particularly compelling evidence that such regulations are necessary. Here, no party has presented any argument or evidence suggesting that section 202(a) *permits* the rule sought by small and rural carriers, much less that the statute or public interest *requires* it. Under these circumstances, the Commission should continue to allow the

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16 *Id.* at 13501-02, para. 12.

17 *Id.* Even some competitive carriers – the presumed beneficiaries of the "pick and choose" rule – favored its abolition, arguing that an "all-or-nothing" regime would allow them "to negotiate mutually beneficial concessions with incumbent LECs to facilitate innovative business strategies." *Id.* at 13502-03, para. 13.

18 *See* Verizon Wireless Comments at 5, 19.

competitive CMRS market to serve the American public as it has so successfully, not intervene in, and inevitably distort, that market.

III. THERE IS NO MARKET FAILURE.

A. Carriers Are Not Being Denied Access To Automatic Roaming Agreements.

Some carriers commented that changes in the marketplace have reduced the incentives for large carriers to enter into automatic roaming agreements with smaller carriers. They argued that the FCC needs to adopt a rule to ensure that all carriers are able to enter into automatic roaming agreements.[19] The minimal facts they offered, however, do not support these claims. As Verizon Wireless stated in its opening comments, it does not decline to negotiate roaming agreements with other carriers, even where it has no need for reciprocal roaming services from the requesting carrier. Verizon Wireless also continues to maintain its automatic roaming arrangements with analog service providers.[20] Not surprisingly then, no commenter argued that Verizon Wireless had refused to negotiate an automatic roaming agreement. While one carrier, NTCH, stated that Verizon Wireless did not begin automatic roaming negotiations until recently, as discussed below, Verizon Wireless never rejected any request by NTCH for an automatic roaming agreement.[21]

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19 *See* MetroPCS Comments at 5-12; NTCH Comments at 4; Leap Wireless Comments at 11-12; RTG/OPASTCO Comments at 6-10.

20 Verizon Wireless Comments at 10 and 20. Similarly, T-Mobile commented that it has roaming agreements in place with all other GSM/GPRS wireless carriers in the United States. T-Mobile Comment at 3.

21 Two carriers did allege that Verizon Wireless refused to provide home roaming and would not consider advanced data service roaming. Those issues are discussed in separate sections below.

Most of the claims advanced to support the alleged market failure were either conclusory assertions or did not identify the carriers involved. The factual showing falls far short of what the FCC requested in the NPRM before it would consider regulation.[22] Given this lack of evidence to support carrier claims of a refusal to negotiate, there is no record on which to base a finding that the market is failing to make automatic roaming agreements available to any market segment.

B. Carrier Examples of Roaming Market Failure Omit or Misrepresent Facts and Do Not Demonstrate Market Failure.

The FCC stated that it will not adopt automatic roaming regulation unless there is clear evidence of market failure.[23] In an effort to meet this burden, two carriers point to their roaming arrangements with unnamed "national" carriers. To the extent these claims pertain to Verizon Wireless, they are extremely misleading, and misrepresent or omit key facts.

Leap Wireless, for example, stated in its comments that "one carrier has forced Leap to accept an arrangement in which Leap pays *increasing* rates for roaming the more that its customers use the network – thus penalizing Leap for *increased* volume. [emphasis included in original]"[24] Leap went on to state, "The only possible explanation

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22 NPRM at 11-12.

23 Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, *Notice of Proposed Rulemaking*, WT Docket No. 00-193, 15 FCC Rcd 21628, 21635 (2000) (hereinafter "2000 NPRM") ("we do not believe we should adopt any automatic roaming rule unless it is clear that providers' current practices are unreasonably hindering the operation of the market to the detriment of consumers"). *See also*, NPRM at 11-12.

24 Leap Comments at 13.

is that the carrier was flexing its market power to penalize a regional carrier for being a successful competitor."[25]

Verizon Wireless has a roaming agreement with Leap that provides for rate increases once call volumes reach certain levels and therefore believes it was likely the subject of these Leap comments. As Leap well knows, the roaming agreement it has with Verizon Wireless was negotiated last year as part of a much larger property acquisition whereby Verizon Wireless purchased 24 PCS licenses and 4 operating markets from Leap. Early in the property acquisition negotiations with Verizon Wireless, Leap made it clear to Verizon Wireless it wanted to negotiate a nationwide roaming agreement as a component of the deal. Leap also requested a low nationwide roaming rate. Verizon Wireless was reluctant to agree to such a low rate with Leap since Verizon Wireless had no need for its customers to roam on Leap's network in any of Leap's markets. However, given Leap's representation that it was seeking only to develop an "occasional" roaming service for its customers, Verizon Wireless proposed an approach that Leap agreed to: Leap received its low requested rate, but the rate increases if Leap's average per customer usage rate increases beyond the "occasional" roaming service level. To date, Leap's roaming usage is nowhere near the levels it would have to reach to trigger the rate increases, so Leap has been paying Verizon Wireless the low rate that it requested and the contract provision Leap complains about has had no effect on the price Leap pays Verizon Wireless for roaming. Even in the unlikely event that Leap's total demand exceeds the average per customer volume threshold that would raise its roaming rate, that rate would only be applied to the incremental minutes above that threshold. That is, Leap

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[25] *Id.*, at 14.

is guaranteed to pay Verizon Wireless the lowest rate agreed to for the minutes that qualify as "occasional use."

As these facts make clear, the terms of the roaming agreement between Leap and Verizon Wireless were the product of arm's length negotiation with each side giving valuable consideration in exchange for the benefits received. Based on these facts, it was patently false for Leap to state that the terms of that agreement were in any way "forced" upon Leap or were the product of an exercise of market power. Rather, the Leap agreement is an example of how a carrier that offered absolutely no roaming benefits to a larger carrier was nonetheless able to use the competitive CMRS marketplace to its advantage in negotiating a roaming agreement with very favorable terms.

NTCH, which operates as Cleartalk Wireless, asserted that one national CDMA carrier "refused to discuss terms until this recent Commission NPRM on roaming was initiated."[26] NTCH also contended that the only small carriers receiving national carriers' best automatic roaming rates are those that receive Universal Service Fund ("USF") subsidies. NTCH argued that because these carriers are subsidized, the large carriers cannot profitably come in and serve the market and drive the smaller carrier out of business. As a result, the large carriers have no choice but to offer attractive roaming rates to subsidized carriers.[27]

Since Verizon Wireless is a national CDMA carrier and it does not yet have an automatic roaming agreement with NTCH, Verizon Wireless can only assume that NTCH's allegations about a large carrier refusing to negotiate until recently referred to

[26] NTCH Comments, at 3-4.

[27] *Id.*, at 6.

Verizon Wireless. Contrary to NTCH's statements, Verizon Wireless entered into negotiations on an automatic roaming agreement with NTCH in November of 2004, almost a full year *before* the FCC's NPRM in this proceeding. Those negotiations are ongoing. Verizon Wireless is not aware of any instance previous to the current negotiations where NTCH requested a roaming agreement with Verizon Wireless and was refused. As such, NTCH's argument with respect to Verizon Wireless appears to misrepresent the facts. While Verizon Wireless is unable to discuss the specifics of the draft agreement it has been negotiating with NTCH due to a confidentiality agreement with NTCH, it can state that rates in the draft agreement are low. Verizon Wireless believes NTCH was aware of the favorable rates in the draft contract when it filed its initial comments in this proceeding. Moreover, because NTCH does not receive USF subsidies, NTCH's negotiations with Verizon Wireless disprove the allegation that Verizon Wireless only offers its lowest rates to subsidized carriers.

RTG/OPASTCO, in their comments, also made several unsupported claims of market failure, but do not set forth any facts which appear to involve Verizon Wireless.[28] In particular, RTG/OPASTCO argued that large carriers have market power and abuse that power to "demand a premium . . . from the rural carrier to roam on their networks while paying only a few cents per minute to roam on the rural network."[29]

As with so many of the allegations made by proponents of FCC roaming regulation, RTG/OPASTCO offered little if any support for their contention that large carriers are using supposed market power to force non-reciprocal agreements on rural

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[28] RTG/OPASTCO Comments at 6-10.

[29] *Id.*, at 8-9.

providers. Indeed, the only "proof" of widespread harm offered by RTG/OPASTCO appears in nine examples set forth in the pages following its allegations. Interestingly, however, only two of the nine examples alleged that a large carrier used its bargaining position to force non-reciprocal rates on the smaller provider. In both cases, the large provider was AT&T Wireless, a large carrier that no longer exists.[30]

RTG/OPASTCO's claims of forced non-reciprocal rates have even less validity in light of the facts presented by Verizon Wireless in its opening comments. There, Verizon Wireless stated

> Verizon Wireless has almost no roaming agreements where the roaming partner pays more per minute than what Verizon Wireless pays, and no reciprocal roaming agreements where a small or rural carrier pays more than what Verizon Wireless pays for roaming. Indeed, because small and rural service providers are often the only technologically compatible carriers in their markets, the most asymmetrical agreements that Verizon Wireless has – in terms of Verizon Wireless paying significantly more than it charges its roaming partner – are agreements with small and rural service providers.[31]

These facts prove that contrary to RTG/OPASTCO's claims, small and rural carriers have non-reciprocal agreements where they pay <u>lower</u> rates than their roaming partners.

Because RTG/OPASTCO's examples of alleged market failure did not reveal the identities of the carriers involved, Verizon Wireless cannot identify the carriers, let alone respond. Nor can the Commission give any credence to such anonymous and conclusory allegations. Basic laws and principles of administrative rulemaking that the Commission follows require that any regulations be solidly grounded in empirical data and that, absent such a foundation, regulations are invalid. RTG/OPASTCO did not meet

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[30] *Id.*, at 11-13.

[31] Verizon Wireless Comments at 14.

its burden of establishing a factual record that could justify consideration of new rules. The Commission cannot lawfully take action on such a threadbare record.

C. CMRS Roaming Is Not a Distinct Market.

Recognizing that the CMRS marketplace is competitive and no carrier has market power, Leap attempted to make its case for regulation by arguing that there is a wholesale market for roaming that is distinct from the CMRS retail market. Based on the findings of its economic consultant, it argued that the wholesale roaming marketplace should be evaluated based on the number of providers using the same technology in a geographic market. It argued, further, that only one or two large carriers possess the lion's share of the overall market within each technology. As such, it contended that large carriers have market power in their wholesale markets.[32]

Contrary to these assertions, the CMRS market cannot properly be divided into technology types under existing government policy and FCC precedent for defining a market. As Doctor Rosston wrote in his paper, "An Economic Analysis of How Competition Has Reduced High Roaming Charges," the Department of Justice/Federal Trade Commission Guidelines ("DOJ/FTC Guidelines") define a relevant product market as "the smallest set of products and geographic area such that control by a single entity could hypothetically be profitably monopolized."[33] Dr. Rosston noted that in analyzing

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32 Leap Comments at 6-12, and Attachment A, "Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service: An Economic Analysis" (November 2005) ("ERS Report") at 3-9.

33 Sprint Nextel Comments, Attachment, Gregory L. Rosston "An Economic Analysis of How Competition Has Reduced High Roaming Charges," ("Rosston Economic Analysis") at 11-12, citing United States Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," Revised April 8, 1997.

the AT&T Wireless/Cingular merger, the FCC analyzed the transaction under a single market definition.[34] Dr. Rosston stated that narrow technology-driven markets are not appropriate because consumers by and large do not shop for services based on technology. Accordingly, a hypothetical monopolist could not increase prices profitably in the home market by raising roaming charges, because consumers would react by choosing another service provider.[35]

To illustrate Dr. Rosston's point in the context of roaming, even if a CDMA provider was the only source of roaming in a particular market to another CDMA carrier, and that other carrier were forced as a result to pay high per minute roaming charges and passed those charges onto its customers in the form of high roaming prices, customers in that market would be able to choose service from another carrier in the market rather than pay the high charges. As a result, the carrier with market power would reap no benefit from its exercise of that market power. The Commission affirmed this analysis in the AT&T Wireless/Cingular Wireless Merger Order, stating

> our concern in this context is with the effect of this merger on consumers of mobile telephony services, not on particular mobile telephony carriers per se. In this regard, we believe that an overall disciplinary force in the context of the intercarrier market for roaming services is that customers of various firms always have the option to switch to firms employing other air interfaces. In other words, if any mobile telephony consumers – regardless of whether they are on GSM, TDMA or analog-only plans – were to find that the roaming aspects of their wireless service plans became less favorable (whether in terms of price or in terms of coverage) as a result of this merger, they would always have the option not only to

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34 Rosston Economic Analysis at 12, citing Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21558 (2004) (hereinafter "Cingular-ATTW Merger Order") at para. 74.

35 Rosston Economic Analysis at 12-14.

upgrade to a GSM plan (in the case of TDMA or analog customers), but to switch to a CDMA-based carrier altogether.[36]

Dr. Rosston's analysis along with the FCC's market analysis in the AT&T Wireless/Cingular Wireless Merger Order demonstrate that the CMRS marketplace cannot be divided into separate retail roaming segments. Because the CMRS market is undoubtedly competitive, Leap's efforts to show market failure through economic theory necessarily fail.

D. There Is No Basis To Link CMRS Roaming Rates To Wholesale and Retail Rates.

Leap argued that roaming rates are on average higher than the rates that carriers charge to certain resellers, sometimes referred to as Mobile Virtual Network Operators ("MVNOs"). While Leap acknowledged that volume discounts might explain some of the alleged rate discrepancy, it contended that the exercise of market power is the real driving force behind the rate difference.[37] Leap argued further that roaming rates far exceed large carriers average retail revenue per minute.[38] Leap argued that carrier roaming rates should be capped at carrier revenue per customer.[39] NTCH contended that

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[36] AT&T Wireless/Cingular Merger Order, 19 FCC Rcd at 21591, para. 180.

[37] Leap Comments at 14.

[38] *Id.*, at 13. Leap's Economic Consultant, ERS Group, calculated large carrier average revenue per minute by taking carriers' most attractive retail price plans and making assumptions about minutes of use and carrier costs. *See* ERS Report at 10-13. Putting aside the flaws in this approach, it is simply not relevant since the premise that roaming and retail rates should be the same or similar is unsupported and incorrect, as Dr. Rosston points out.

[39] *Id.*, at 19-20.

large carriers roaming rates should be tied to the rates made available to MVNO partners.[40]

Roaming rates cannot be compared to retail or wholesale rates. Verizon Wireless' pricing schemes for roaming, retail and wholesale rates have a significant spread between the highest and lowest rates. Thus roaming rates for some customers may be lower than average wholesale or retail rates, while the rates for others might be higher.

The rate that applies to a particular roaming partner, retail customer or reseller depends on the factors present. In its initial comments, Verizon Wireless commented that roaming rates vary depending on the need to expand the carrier's footprint into a new area, the availability of other carriers, the size of the roaming partner's customer base, the extent to which the roaming partner has implemented advanced digital technologies and other features, and the scope of geographic network coverage.[41] Reseller rates, on the other hand, tend to vary based on the size or potential size of the reseller or MVNO customer base and the perceived ability of the reseller or MNVO to reach a market segment that the carrier is not otherwise reaching. Retail rates take into account the prices for similar retail services from other providers in the marketplace.

Because prices for roaming, wholesale, and retail services are based on a mix of varying considerations, it is not surprising that prices for the different service categories vary. Moreover, because the rates are not comparable, there is no basis for using average wholesale or retail rates as a guideline or cap on roaming rates.

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[40] NTCH Comments at 6; RTG/OPASTCO Comments at

[41] Verizon Wireless Comments at 4.

Arguments that differences in the price of roaming services as compared to wholesale and retail prices constitute unlawful discrimination also fail as a legal matter. It is well settled that Section 202 of the Communications Act only proscribes unreasonable discrimination.[42] In the *Orloff* case, the United States Court of Appeals for the District of Columbia Circuit upheld a FCC decision that in the competitive CMRS marketplace, where filed rates are not required and where no single service provider is a dominant carrier, differences in prices due to negotiating (or "haggling") are reasonable. The Court stated that "Haggling is a normal feature of many competitive markets. It allows consumers to get the full benefit of competition by playing competitors against each other."[43] Just as the FCC and the *Orloff* Court found that differences in prices to customers arrived at through negotiations were reasonable in a competitive marketplace, any differences between roaming rates and those for wholesale and retail services are attributable to the competitive marketplace and are not unreasonable under existing law. As discussed in Section II of these Reply Comments, *supra,* the Commission has previously rejected arguments that carriers must treat entities alike notwithstanding fundamental and material differences.

IV. THE COMMISSION SHOULD NOT REQUIRE CARRIERS TO OFFER HOME ROAMING.

In its initial comments, Verizon Wireless argued that the Commission should not require carriers to offer home roaming, even if the FCC adopts a mandatory automatic

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42 *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003).

43 *Id.*, at 421.

roaming requirement.[44] Leap, however, argued that certain home roaming restrictions prevent regional carriers from roaming in some areas where the regional provider does not have network facilities and therefore does not compete directly with the larger carrier. It contended that because large carriers have large home markets, the home market restrictions prevent roaming in an overly large area to the detriment of the smaller carriers.[45]

It is important for the FCC in this proceeding to protect carriers' ability to restrict home roaming. As Verizon Wireless previously discussed, allowing carriers to prohibit home roaming serves the public interest by spurring investment in network facilities. If competing carriers were able to gain access through roaming to another carrier's superior network, then carriers would not benefit from their investments in network improvements. As such, a home roaming requirement would impair network quality, reliability and coverage as facets of CMRS competition.[46]

Home roaming areas are based upon network System Identification Numbers or "SIDs." The SID is a market-specific and carrier-specific number that is broadcast by the network so that mobile handsets will know the SID of networks within range of the handset. SIDs were originally issued by the FCC for cellular RSAs and MSAs licensed by the FCC. The "home" SID is programmed into the handset so that when the handset is within range of the home network, the handset will be in home mode and no roaming charges will be incurred. When the handset is out of range of the home network, it will

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44 Verizon Wireless Comments at 15-16.

45 Leap Comments at 15-16. *See also,* RTG/OPASTCO Comments at 12.

46 Verizon Wireless Comments at 15-16.

compare the SIDs within range to the SIDs in the preferred roaming list ("PRL") loaded into the phone. The handset will choose to be served by the network SID that is highest on the PRL. Carriers choose the order of the SIDs in the PRL based largely on the terms of the automatic roaming agreements with other carriers; typically, the lower the roaming rate that Verizon Wireless must pay, the higher that roaming partners' SIDs will be in the PRL. This market-driven system enables customers to enjoy the lowest possible roaming prices.

In older handsets, when the handset was out of range of the home market network, it would display a roaming icon to the user so that the user would know that he or she is roaming.[47] Before nationwide calling plans with included roaming minutes and long distance became popular, customers would be less likely to use their handsets when the roaming icon was displayed so as not to incur roaming costs. Carriers found that by increasing the size of the home market, they encouraged more use of the network. Carriers therefore consolidated the SIDs of several adjacent markets into one broadcast SID. As a result of this SID consolidation, many carriers like Verizon Wireless have large home markets consolidated under a single SID.

Leap argued that because large carrier home markets are larger than regional and small carrier serving areas, a home roaming restriction imposed by a large carrier can prevent smaller carriers' customers from roaming on the larger carrier's network even where the smaller carrier has no competing network. While the situation described by

47 In more modern handsets, carriers can determine whether to display the roaming icon depending on the SID of the serving network. Generally, today, carriers choose not to display the roaming icon when the handset is being served by the home carrier network – even when the mobile is outside the home market – or by the network of a preferred roaming partner.

Leap does exist in some markets, there is no basis for the FCC to require that home roaming be offered to roaming partners.

First, it should be noted that Leap is licensed to provide service in the areas where it complains it cannot receive roaming service from Verizon Wireless. Therefore, Leap has the option to provide service to its customers by extending its network into these areas. Thus, Leap's example actually proves Verizon Wireless' point that requiring carriers to offer home roaming removes other carriers' incentive to build out their own networks. Second, Leap has not argued and does not present evidence that it has no roaming partner alternatives in the areas where large carriers' home markets are larger than Leap's serving areas.

Third, the situation Leap describes is not really an argument opposed to home roaming, but rather a complaint about how home markets are defined. Different carriers' geographic service areas vary widely. Rarely is there a perfect fit between carriers' service areas – even in the same defined market. For the FCC to intervene here, it would need to revisit the entire SID-based system and decide to regulate the use of SIDs to define service areas. Doing so, however, would require a reversal of the FCC's decision three years ago to get out of the business of regulating SIDs.[48]

Fourth, there may be a technical solution that will allow carriers with large home markets to better target the home roaming restriction to areas where a smaller carrier has network facilities. Verizon Wireless currently broadcasts Network Identification

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[48] Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Report and Order*, FCC Docket No. 01-108, FCC No. 02-229, 17 FCC Rcd 18401, 18429-18430 (2002).

Numbers or "NIDs" along with the broadcast SID for each market. Each NID corresponds to a subdivision of the SID matching a Verizon Wireless switch. While Verizon Wireless is limited in how many NIDs it can implement in each market and there are technical and operational issues that need to be resolved, the company is exploring whether it can use NIDs to subdivide its home markets and possibly allow carriers to roam in parts of Verizon Wireless' home market where they do not provide service.

V. INCOMPATIBLE DATA TECHNOLOGY PRECLUDES CONSIDERATION OF AN EVDO DATA ROAMING REQUIREMENT.

In its initial comments, Verizon Wireless opposed including advanced data services as part of any automatic roaming requirement the FCC might adopt in this proceeding. Verizon Wireless argued that any such requirement would stifle investment in these services and chill innovation in the marketplace.[49] Most commenters chose not to comment specifically on data roaming. ACS Wireless, however, asked the FCC to require carriers to enter into automatic roaming agreements governing the highest level of data service they provide.[50] While ACS Wireless stated that the market is functioning well for voice and other services, it claimed that it has not had similar success negotiating advanced data roaming agreements. It stated that it has implemented CDMA EvDO advanced data technology in its network and would like to facilitate EvDO roaming for its customers. It contended that other national EvDO carriers have "refused to entertain any proposals for roaming agreements."[51]

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[49] Verizon Wireless Comments at 19.

[50] ACS Wireless Comments at 6.

[51] *Id.*, at 4.

Verizon Wireless has implemented EvDO technology in parts of its network. While Verizon Wireless has a nationwide automatic roaming agreement with ACS Wireless for CDMA-based 1xRTT data service, at present, Verizon Wireless does not have an agreement with ACS Wireless or any other carriers for EvDO roaming. Verizon Wireless is currently working on a technological solution that will permit EvDO roaming, but at present, technical issues prevent Verizon Wireless from offering advanced data roaming. While the FCC should not regulate data roaming for the reasons stated in the initial comments of Verizon Wireless, these technical issues provide additional reasons for continuing to allow the market to drive data roaming agreements.

First, the EvDO standards allow for optional methods for authenticating a subscriber. Networks that use one method for authenticating subscribers may not be compatible with networks that use another method. For example, one method of EvDO authentication is known as A-12 authentication. Carriers can choose to use or not to use A-12 authentication. Thus, before any carrier can enter a roaming agreement for EvDO-based services, it must resolve the authentication issue. Both carriers need to agree to support the other's authentication method in order to enable EvDO roaming. Depending on the technical complexity of supporting the authentication, such roaming can be extremely difficult to implement.

Another technical impediment to EvDO roaming may exist depending on how each carrier assigns the IP addresses for data sessions. Verizon Wireless has chosen to implement EvDO with Mobile IP only, meaning that the customer's home network assigns the IP address for the data session and security measures put in place by the home carrier to protect the network will follow the customer. Other carriers have implemented

EvDO with Simple IP only, meaning that the serving network assigns the IP address and controls the data session. Unless both carriers use the same method to assign IP addresses, EvDO roaming will be extremely difficult to implement. EvDO roaming will work, however, if one carrier has Mobile IP only and the other carrier has both. In order to implement EvDO roaming with a roaming partner that uses Simple IP only, either Verizon Wireless or the roaming partner or both will need to make significant technical changes in their respective networks. Since Verizon Wireless has no plans to deploy Simple IP in its EvDO network, Verizon Wireless will not be able to enter into EvDO roaming agreements unless the roaming partner has also deployed Mobile IP.

Until the technical issues associated with EvDO roaming can be resolved and tested, it is premature to consider any intervention into these issues. Moreover, because the record reveals no market failure and because, as Verizon Wireless' initial comments showed, an advanced data roaming requirement would chill investment and stifle innovation, the Commission should not consider any advanced data roaming services requirement.

VI. CONCLUSION

The FCC's competitive roaming policies have brought significant benefits to consumers in all areas in the form of expanded networks, advanced new services, and low nationwide roaming rates. The record in this proceeding shows that smaller carriers are able to get automatic roaming agreements and that customers in rural markets can obtain service plans with reasonable roaming rates if they so desire. Carriers supporting FCC automatic roaming regulation have utterly failed to demonstrate that there is market failure that prevents them from getting automatic roaming agreements at reasonable rates. Accordingly, there is absolutely no basis for the FCC to abandon its reliance on the market in favor of heavy-handed new regulation.

Respectfully submitted,

VERIZON WIRELESS

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